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No. 80-2192

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARY JOSEPHINE WOOD,
Petitioner,
v.
SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

On Writ Of Certiorari From The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	Page
Preliminary Statement	1
Respondents Brief in Opposition to Petitioner's Petition for Writ of Certiorari	1
Argument	6
A. The United States Court of Appeals for the Eighth Circuit Did not Commit Error nor Depart from the Accepted Course of Judicial Proceedings when it Affirmed the Trial Court's Decision that the Respondent had not Discriminated Against Petitioner and had Compensated Her at a Rate Commensurate with Male Employees.	7
B. The Court of Appeals did not Commit Error Nor did it Depart from the Accepted and Usual Course of Judicial Proceedings when it Affirmed the Trial Court's Overruling of Petitioner's Motion for the Exclusion of Witnesses.	10
C. The Lower Courts Correctly Ruled that the Respondent had not Discriminated Against the Petitioner in Violation of Title VII of the Civil Rights Act of 1964 Under the Circumstances Surrounding Her Application for, Training in, and Demotion from, a Deskman's Position.	11
Conclusion	21

TABLE OF AUTHORITIES

Braswell v. Wainright, 330 F.Supp. 281 (D.C. Fla. 1971) 11

Cedeck v. Hamiltonian Federal Savings & Loan Ass'n, 551 F.2d 1136 (8th Cir. 1977) 18

Copeland v. U.S., 343 F.2d 287, 120 U.S.App. D.C. 5 (1964) 10

Dent v. St. Louis San Francisco Railway Co., 265 F. Supp. 56 (D.C. Ala. 1967) 20

DiSalvo v. Chamber of Commerce, 568 F.2d 593 at 596 [2,3] (8th Cir. 1978) 17

Everett v. TWA, 298 F.Supp. 1099 (D.C. Mo. 1959) ... 20

Falkowski v. Perry, 464 F.Supp. 1016 (D.C.Ala. 1976) . 19

Glus v. G.C. Murphy Co., 562 F.2d 880 (3rd Cir. 1977). 20

Johnson v. Seaboard Air Line R-R Co., 405 F.2d 645 (4th Cir. 1968) 20

Lewis v. General Motors Corp., 557 F.2d 1255 (8th Cir. 1977) 17

Local 179 United Textile Workers of America, ALF-CIO v. Federal Paper Stock Company, 461 F.2d 849 (8th Cir. 1972) 20

Mead v. U.S. Fidelity & Guaranty Co., 442 F.Supp. 318, aff'd 545 F.2d 222 19

Middleton v. Remington Arms Company, Inc., 594 F. 2d 1210, at 1213[2] (8th Cir. 1979) 12

Mickel v. S.Car State Empl. Service, 377 F.2d 117 (D.C. Cir. 1974) 20

Naraine v. Western Electric Co., 507 F.2d 590 (8th Cir. 1974) 16

Pack v. Energy Research and Development Administration, 566 F.2d 1111 (8th Cir. 1977) 18

Parson v. Kaiser Aluminum & Chemical Corp., 575 F. 2d 1374 (5th Cir. 1978) 16

Shull v. Dain, Kalman & Quail, Inc., 561 F.2d 152, at 155[2] (8th Cir. 1977) 16

Sokolowski v. Swift & Co., 286 F.2d 880 (D.C. Minn. 1968) 20

Texas Dept. of Community Affairs v. Burdine, 450 U.S. ____, 67 L.Ed. 207, 101 S.Ct. 1089 (1981) 18

Tuft v. McDonnell Douglas, 581 F.2d 1304 (8th Cir. 1978) 12

U.S. v. Leggett, 326 F.2d 613 (C.A.N.C. 1964), *cert. den.* 84 S.Ct. 1633, 377 U.S. 955, 12 L.Ed.2d 499 . 11

U.S. v. Robinson, 502 F.2d 894 (7th Cir. 1974) 10

United States v. St. Louis-San Francisco Railway Co., 464 F.2d 301 (8th Cir. 1972) 9

Rule 615, Federal Rules of Evidence, 28 U.S.C.A. 11

Supreme Court Rule 19, 28 U.S.C.A. 6

Time Requirements for Civil Actions for Violation of Equal Employment Opportunity Provisions under §706 of the Civil Rights Act of 1964, 4 A.L.R. Fed. 833) 20

Title VII of the Civil Rights Act of 1964, 42 U.S.C.A., §2000(e) 1,2,11,16,18,20

42 U.S.C.A., §2000(e)(3) 19

88 C.J.S., Trial §§65, 66 10

75 Am.Jur.2d, Trial §61 10

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PRELIMINARY STATEMENT

Respondent generally agrees with Petitioner's jurisdictional statement but denies that this Court has any jurisdiction with respect to Petitioner's allegations of harassment and retaliation under Title VII of the Civil Rights Act of 1964.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

The Statement of the Case in the Petition for Writ of Certiorari is incomplete and omits certain material evidence. Therefore, Respondent submits the following Supplemental Statement of the Case, which provides necessary insight to the Court for the proper determination of Petitioner's request for

review of the decision of the United States Court of Appeals for the Eighth Circuit.

The instant proceedings arises as a result of Petitioner's allegations of discriminatory treatment by her employer (Respondent) due to her sex. Suit was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000(e) *et seq.*

Petitioner complains of discrimination by reason of improper training for the position of Deskman (Count I), of discrimination during her tenure as a Deskman (Count II), of discrimination in connection with her demotion from Deskman to Repair Clerk and her five unsuccessful subsequent applications to return to the position of Deskman (Count III); and of discriminatory harassment and reprisals following her demotion (Count IV). Respondent submits the decision of the lower courts in its favor is supported by the evidence adduced at trial and applicable statutes and judicial decisions.

The facts of the case are not terribly complex.

The Petitioner was employed by Respondent as a stenographer on April 18, 1950. (Def. Ex. P)[1] On November 16, 1965, she accepted a management position entitled personnel records analyst. (Def. Ex. L) During this period of employment with Respondent, Petitioner obtained a college degree under Respondent's College Tuition Plan and is a qualified secondary teacher in English and Spanish. (79 Tr. 499) Following an approved leave of absence, on August 2, 1967, she accepted the position of repair clerk in Respondent's plan department. (Def. Ex. L) She applied for and was accepted as a deskman on December 1, 1968. (Def. Ex. L) Deskmen are required to operate from a "Test Desk position" to test, analyze and direct repair forces on complicated communications circuits, including wires and telephone sets of residential and business customers throughout an assigned geographical area.

[1] Defendant's Exhibits A-T were offered and admitted at Page 577 of the record.

During Petitoner's first few days on the job, she received orientation and training. (79 Tr. 292) In February, 1969, after two months of training, Respondent assigned an experienced Chief Deskman, a management employee, (79 Tr. 364) to instruct and train Petitioner and other new testers in the proper testing techniques to locate trouble, analyze it and to determine the needed repairs. (79 Tr. 305)

One supervisor (McGrath, 79 Tr. 46, 58), who supervised Petitioner from December, 1968 through August 1, 1969, placed her on probation because he observed her difficulty in grasping the basic theory of maintenance testing (79 Tr. 45); because she placed excessive written comments on the "trouble tickets" with resulting delay in repair procedures (79 Tr. 51); and because she continually used the incorrect terminology, resulting in confusion in expediting repairs. (79 Tr. 52) He further observed that Petitioner was able to understand written instructions, but was unable, after she had conducted the testing procedures, to determine what repair procedures were required. (79 Tr. 71) He stated she had performed every other job she had had with Respondent very well, and that he wanted her to become an acceptable tester. (79 Tr. 76-78) At the time of Petitioner's placement as a deskman, there was and continued to be no requirement that a tester have prior craft experience. (79 Tr.81)

Another first level supervisor (Schomogy, 79 Tr. 293), who had observed Petitioner's job performance every day, stated that during his supervision of Petitioner, he recommended she be placed on probation because she did not make the proper tests and her production was low (79 Tr. 303). This was done in February, 1969. (79 Tr. 303)

Petitioner's work deficiencies were also observed by her coworkers, including Delores Stewart (79 Tr. 449), a frameman (a craft position), who worked with the testers, including Petitioner. She stated that the Petitoner would not provide informa-

tion needed to do her job as a frameman. Petitioner would provide information in technical terms, but did not tell her the information she required to do her job. (79 Tr. 513) She related that the Petitioner was a slow worker. (79 Tr. 518) She also stated that during her employment with Southwestern Bell, she had not been treated differently than males because of her sex. (79 Tr. 510)

In addition to the supervisors referred to above, other of Petitioner's managers who supervised her found that she had performed the job unsatisfactorily for the eleven-month period she held the position, and that in their contacts with her, they treated her as they did other employees. (79 Tr. 28, 29, 71, 128)

Another supervisor who supervised the Petitioner in October and November, 1969 (79 Tr. 269, 274) stated that while her attitude, determination and education presented a good impression (79 Tr. 280-282), he observed that she understood the various instructional pamphlets and practices, but was unable to learn the facts of a particular repair problem and was of the opinion she was not making acceptable progress in performing the job. The reasons were that she wasn't understanding and applying the basic testing procedures and was talking excessively with subscribers (Def. Ex. C, p. 2)[1]; she made too many notes (Ex. C, p. 3); her technical ability was weak (Ex. C, p. 8); she spent too much time on minor details (Ex. C, p. 8); her judgment was weak (Ex. C, p. 9); she couldn't analyze trouble reports (Ex. C, p. 16); she made too many notes (Ex. C, pps. 18, 19, 20); the quality of her testing and her productivity were not acceptable (Ex. C, p. 26); she had difficulty following the technical procedures (Ex. C, p. 39) and her overall job performance was unsatisfactory. (Ex. C, p. 40)

On November 9, 1969, Petitioner was demoted from deskman and returned to the position of repair clerk, for the reason that she was unable to perform the required duties of a tester. (Def. Ex. L)

other employee complaints. Petitioner chose not to pursue that remedy. She did not lodge a charge of disparate pay treatment with the Equal Employment Opportunity Commission, nor has she ever sought relief under the Equal Pay Act. [29 U.S.C.A. 206(d)(1)]

The non-supervisory, employee compensation provision in Section 2 of Art. 2 of Art. III of the Agreement (Ex. H) specified that rates of pay, progression schedules and exchange classifications as used in determining rates of pay applicable to employees, when, regardless of seniority, they enter into a craft position as deskman. When Petitioner, at her request, was assigned duties as a deskman, her salary was in excess of that provided for a beginning tester. However, since it was a promotion, she received a minor increase in pay, which was the highest rate of pay in her starting group, and thereafter Petitioner remained at the highest rate of that group with whom she began her employment as a tester. (Def. Exs. H and L)

Petitioner's interpretation[2] of the Collective Bargaining Agreement that she was paid less than males (of which there was no evidence), is mistaken because all craft jobs were compensated for on the basis of an employee's service—or seniority—for the employee's period of service *within* the *craft* classification pay scale. (Def. Ex. H, p. 45 and Note (B), p. 46) The employee's overall seniority was not disregarded because it was still the determining factor for choice of hours of work; choice of vacation weeks; and choice of overtime worked. Moreover, it was a significant factor in job-bidding and promotions, but it did not provide a basis for salary placement at a level higher than that provided by the craft pay scale. After her application, her passing of the craft test enabled her to be considered for the testing position, and due to her seniority, she was placed in that position.

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[2] No evidence of error was adduced at trial concerning Def. Ex. H, as the District Court ruled that Ex. H was the best evidence of its contents.

Petitioner argues she received disparate pay treatment during the period of time she was a tester, since she had been relegated to "low-paying" all female positions. The evidence, however, which reveals that her initial application for employment indicated her desire to be an operator or a clerical employee (79 Def. Ex. P, p. 79 Tr. 440), and the evidence of the other positions she held since 1960 (79 Def. Ex. L), strongly suggest a contrary conclusion. Further, on one occasion, she had been promoted to a management position at a higher rate of pay (79 Def. Ex. L, 79 Tr. 441), and has been offered other management positions. (79 Tr. 442) She had not applied for a craft position as provided for in the Collective Bargaining Agreement until 1968, when she applied for the deskman position. She was promptly accepted for that position (79 Tr. 441, 442).

Under the reasoning of *United States* v. *St. Louis-San Francisco Railway Co.*, 464 F.2d 301 (8th Cir. 1972), and under 42 U.S.C.A. 2000(e)(2)(h), Respondent contends that its seniority system as applied to Petitioner is a *bonafide* seniority system. As the Court stated, there must be pertinent objective criteria for determining what applicants for promotion or transfer are qualified to fill particular vacancies. *Id.* at 309. Additionally, Respondent's Ex. F (a copy of the Consent Decree dated January 18, 1973, U.S. Dist. Ct. E.D. of Penn.) specifically provided that Respondent's seniority system was acceptable and was to be utilized for all purposes.[3] The Consent Decree was the product of litigation between the Federal Government and the Bell System and dealt with employment matters and rights of Bell System employees.

At the time of Petitioner's alleged complaints, the Collective Bargaining Agreement (Ex. H herein) specified that the only requisites for transfer and/or promotion were (1) an employee's

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[3] Since the entry of the Decree, certain modifications occurred, but were not applicable to Petitioner.

desire for a particular job as indicated by a job bid or a letter of application; (2) if a craft job is involved, the employee must pass the craft test; (3) the employee's seniority—not sex—determined the award of the sought after position.

The Petitioner's argument that the rate of pay of any male employee of Southwestern Bell holding the job of deskman with the *same overall seniority* as the Petitioner was higher than Petitioner is totally unsupported by the evidence. The record clearly establishes that at the time of Petitioner's initial placement as a tester, the Petitioner received more pay ($114.00) than the other new testers in her group, and continued to do so while in that position. (Def. Exs. C, M, N & O)

For the foregoing reasons the lower courts' decisions should be affirmed.

B

The Court Of Appeals Did Not Commit Error Nor Did It Depart From The Accepted And Usual Course Of Judicial Proceedings When It Affirmed The Trial Court's Overruling Of Petitioner's Motion For The Exclusion Of Witnesses

The decision of the District Court to exclude witnesses from the courtroom in a civil proceeding is within the discretion of the trial court, and is not subject to review, except in cases of manifest abuse or prejudice. The request to exclude should be timely and in the absence of statute, it should be made at the commencement of the case and comes too late if made after testimony has been received. *U.S.* v. *Robinson,* 502 F.2d 894 (7th Cir. 1974); *Copeland* v. *U.S.,* 343 F.2d 287, 120 U.S. App. D.C. 5 (1964). *See also* 88 C.J.S., Trial §§65, 66 and 75 Am. Jur.2d., Trial §61.

In the instant case, the Petitioner's counsel did not request exclusion of Respondent's management employees until the morning of the second day of trial. (79 Tr. 133) No reasons were

given for the request which was subsequently denied by the District Court *until* the filing of Petitioner's brief in her appeal to the Eighth Circuit wherein the stated reason was "plaintiff's counsel was fearful of reprisals against non-management witnesses." (App. Brief, p. 33) However, neither the evidence at trial nor Petitioner's brief set forth any proof or facts underlying his alleged fears. Her Petition for Writ of Certiorari herein, likewise, fails to do so.

Rule 615, Exclusion of Witnesses, provides:

> "At the request of either party the court shall order witnesses excluded *so that they cannot hear the testimony of other witnesses*," (Emphasis Added.)

The purpose of the exclusion rule has been stated to be for the purpose of discouraging and exposing fabrication, inaccuracy and collusion; *Braswell* v. *Wainright*, 330 F.Supp. 281 (D.C. Fla. 1971) and the avoidance of shaping or matching of testimony, *U.S.* v. *Leggett*, 326 F.2d 613 (C.A.N.C. 1964), *cert. den.* 84 S.Ct. 1633, 377 U.S. 955, 12 L.Ed.2d 499. There has been no showing or allegation that other witnesses patterned their testimony after witness McAdams. Indeed, an examination of the record is clear that the remaining witnesses who testified did not fashion their testimony after witness McAdams, or any other witness.

Respondent submits that Petitioner's allegation of error must fail inasmuch as Rule 615 simply does not apply to the facts herein and because the district court did not abuse its discretion in rejecting the Petitioner's late request.

C.

The Lower Courts Correctly Ruled That The Respondent Had Not Discriminated Against The Petitioner In Violation Of Title VII Of The Civil Rights Act Of 1964 Under The Circumstances Surrounding Her Application For, Training In, And Demotion From, A Deskman's Position.

Petitioner argues that Respondent discriminatorily treated her in training for and demotion from the deskman position. At trial, however, Petitioner's allegations were unsupported by *any* independent, corroborative or probative evidence. In this respect, the District Court heard the witnesses, weighed the evidence, testimony and exhibits and then found adversely to the Petitioner. On appeal that decision was upheld. In this record, the lower courts decisions are entitled to great weight, and should not be reversed unless clearly erroneous, which Respondent submits they are not.

The Eighth Circuit held in *Tuft* v. *McDonnell Douglas,* 581 F.2d 1304 (8th Cir. 1978):

> "It is the plaintiff's burden, in a Title VII case, to establish a prima facie case of discrimination, before the burden of proof shifts to the defendant to show valid reasons for its actions. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). 'The central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex or national origin.' " *Id.* at 1306, quoting from *Furnco Construction Corp.* v. *Waters,* 438 U.S. 565, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957.

Hence, to establish a prima facie case of sex discrimination, Petitioner's evidence must show *at the very minimum,* that in the application for, training in and demotion from the test deskman position, she was treated "less favorably" than similarly situated males in respect to those situations. *Middleton* v. *Remington Arms Company, Inc.,* 594 F.2d 1210, at 1213[2] (8th Cir. 1979)

Considering these in order, Petitioner's own testimony revealed that even though she says she was told to cut her hair before applying for a craft job, she was not required to cut it before becoming a deskman. (McGrath, 79 Tr. 43-44) She submitted

her letter of application for the deskman position to her *Union* and was subsequently informed by a *Union* representative that she should resubmit it in an expanded form *before the Union* would forward it to Respondent's management representatives. (79 Tr. 22 & 24) Mr. McGrath, her second line supervisor, had no objection to her first letter of application, stating it would have been accepted, had he received it. (Tr. 42-43, 67-68) He denied requiring her to cut her hair (Tr. 43-44, 77, 83-84). Arma Williams, another employee, stated that *her* hair had always been long, and she had not been required to cut it prior to being placed in a craft position. (79 Tr. 537)

Petitioner testified she had been aware of craft job openings because notices were posted on the employee bulletin board (79 Tr. 19); however, she "thought" that these craft jobs were restricted to men. (79 Tr. 19) Significantly, however, despite this alleged belief, *she did apply* to be a deskman. On cross-examination, she was not able to direct the District Court to *any* language in the Collective Bargaining Agreement (79 Tr. 445), restricting applications or openings to men, nor was she able to do so on appeal. No other evidence was adduced by Petitioner in support of her position on this aspect of her claim.

The Petitioner stated that when she applied for the job, she felt she would be discriminated against due to her sex (79 Tr. 468) and felt she was discriminated against when she was assigned as a deskman. (79 Tr. 465)

With respect to her training, the Petitioner's entire argument is that her on-the-job training was a "designed to fail conspiracy". The record is quite clear, however, that she received the same routine orientation, training and daily supervision as did the other testers, and she received the same specialized training from Mr. Wann as did the other testers, which training was over and above that which Mr. Schomogy was able to give. (79 Tr. 364) All of the other new testers, including Miss Williams, progressed. Petitioner did not.

Again, although the Petitioner alleges discriminatory treatment in her training, upon close examination of her testimony it is seen that she thought she apparently needed training and, indeed, had requested to be sent to a training school for basic electricity principles. She now concludes that Southwestern Bell's intent was to harass her and discriminate against her when she was sent to the training class which she had requested. (79 Tr. 467, 468) Further, the evidence is that she was trained by Respondent's personnel in the frame room for two days and in the central office for one day. She stated she thought the time spent was very interesting and helpful. (Def. Ex. D, p. 1)

Petitioner also contends she was discriminated against because she was not allowed to accompany a repair employee outside in order to observe his work. (79 Tr. 274) However, her second line supervisor, John McGrath, stated there was no company policy with respect to a tester accompanying a repair employee outside and no one did. (79 Tr. 81). Petitioner was treated exactly the same as were all other employees.

Arma Williams, a co-worker of the Petitioner and a new tester with her during the period in question testified that she and the Petitioner had received the same training as the new male testers (79 Tr. 530) and that she never observed any physical abuse of the Petitioner by Mr. Wann. (Tr. 532) In addition, Arma Williams, after a few months of training, had progressed to the point where she was assigned night work with minimal supervision and actually had to retest trouble reports which the Petitioner had done during the day (79 Tr. 532, 535)

The Petitioner's contentions that she was discriminated against when she was demoted from the position of deskman is *again* without merit.

An examination of the contents of the Petitioner's personnel file reflects that during her entire time in the deskman job, she experienced difficulties, was unable to grasp the technical aspects of testing and could not analyze the trouble presented.

Exhibits C, D and E reflect that the Petitioner was promptly advised of her difficulties when they occurred. Notwithstanding management's efforts to keep her aware of their appraisals of her, she admittedly gave no credence to her supervisors, since she felt she was performing in an excellent manner, even though she wasn't rated as such. (79 Tr. 459)

Respondent witness Schomogy, a first line supervisor under whom Petitioner worked, and who prepared many of Respondent's records concerning Petitioner, indicated that poor job performance as a deskman was brought to her attention on the following dates: February 10, 1969 - unsatisfactory progress in understanding and applying basic testing procedures and talking to analyze customer trouble reports, unnecessary and excessive notes on trouble tickets; August 12, 1969 - improper testing procedures; August 13, 1969 - unsatisfactory testing and progress; September 16, 1969 - inability to retain and apply instructions - incomplete records; September 26, 1969 - failure to complete a test procedure due to failure to follow instructions; September 30, 1969 - inability to analyze and test; October 3, 1969 - inability to apply proper technical procedures.

Witness Sefton, another supervisor of Petitioner, testified that although she could learn the technique from a book she could not apply it and she was very mechanical in her approach to problem solving (79 Tr. 282); she could not make a decision nor did she have the ability to follow a logical sequence of events and come to the proper conclusion. (79 Tr. 282) He stated that every supervisor that was his equal in other work groups with which the Petitioner had worked requested she be removed from the test desk because of the problems she created. (79 Tr. 284-285) He testified that he recommended she be removed from the test desk due to her lack of organization and analytical abilities. (79 Tr. 286)

Arma Williams, a nonmanagement employee, working as a dispatcher (a craft position) in the fall of 1969 (79 Tr. 533),

stated it was a part of her job to analyze the Petitioner's work in dispatching the necessary repair forces. (79 Tr. 534) She stated the Petitioner was a very critical person when it came to testing, but she didn't use common sense (79 Tr. 534), and as a result of the Petitioner's invalid test results, Ms. Williams was required to retest several customer trouble reports. (79 Tr. 535, 536) Ms. Williams stated that the Petitioner was not a satisfactory tester. (79 Tr. 536)

Respondent submits that the Petitioner has not sustained her burden of proof, inasmuch as her testimony and the evidence adduced by Respondent clearly show that she was unable to perform the duties of a deskman and the company has provided a more than adequate explanation for her demotion.

Appellant, citing *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978), argues that since a finding of non-discrimination is a finding of ultimate fact, such a finding can be reversed on appeal, free of the "clearly erroneous" rule. The Eighth Circuit in *Shull* v. *Dain, Kalman & Quail, Inc.*, 561 F.2d 152, at 155[2], (8th Cir. 1977) held that:

> "It is not the function of an appellate court to try the case de novo, or to pass upon the credibility of witnesses or on the weight to be given to their testimony, and a factual finding is not clearly erroneous simply because a different result might have been reached had the case been tried originally to the appellate court."

The Eighth Circuit has held that the burden is on a discharged former employee claiming a violation of Title VII to affirmatively prove discrimination. *Naraine* v. *Western Electric Co.*, 507 F.2d 590 (8th Cir. 1974) A similar burden exists in the instant case and the Petitioner had the burden to establish a prima facie case of sexual discrimination, which she has failed to do. Hence, although Respondent went forward with evidence at trial, it never was compelled to establish the satisfactory explanation for her demotion as it did. *Naraine* v. *Western Electric, supra.* To

rebut the Petitioner's unfounded allegations and her conclusionary testimony, Respondent offered her performance appraisals and ratings; the testimony of long-term supervisors; and the testimony of co-workers.

In *DiSalvo,* the defendant Chamber of Commerce appealed from a trial court judgment holding it liable to plaintiff for sex discrimination. The District Court found that the Chamber of Commerce had, and was, paying its male employees substantially more than it was paying the plaintiff for substantially equal work, contrary to the facts herein. In affirming the lower court's decision, the Eighth Circuit stated:

> "[t]he findings of fact by the district court are entitled to great weight and we must accept them unless they are clearly erroneous under Federal Rules Civil Procedure 52(a)." *DiSalvo* v. *Chamber of Commerce,* etc. 568 F.2d 593 at 596 [2, 3], (8th Cir. 1978)

The Eighth Circuit took an identical approach in the case of *Lewis* v. *General Motors Corp.,* 557 F.2d 1255 (8th Cir. 1977), where the plaintiff had described several incidents which, in her opinion, demonstrated discriminatory treatment by her co-workers and by her foreman. In affirming the trial court's denial that the discharge was discriminatory, the court stated:

> "The District Court specifically rejected Lewis's testimony regarding the alleged incidents of sexual harassment and found that she had been criticized by her foreman on numerous occasions. The court credited Stephens' testimony that Lewis performed her work improperly and was terminated for that reason. Our review of the record convinces us that the District Court's credibility finding has support in the record and that its factual findings are not clearly erroneous."

Similarly, in the case at bar, the lower courts rejected the Petitioner's testimony regarding alleged incidents of sexual harass-

ment and discrimination and credited the testimony of witnesses Schomogy, Sefton, Stewart, Williams and others, that Petitioner performed her work improperly and was demoted for that reason. *See also Cedeck* v. *Hamiltonian Federal Savings & Loan Ass'n.*, 551 F.2d 1136 (8th Cir. 1977) and *Pack* v. *Energy Research and Development Administration*, 566 F.2d 1111 (8th Cir. 1977). Clearly, therefore, the Trial Court's factual findings in the instant case meet and surpass the "clearly erroneous" test and the Eighth Circuit's decision was proper.

The most recent case, *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. ____, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981) proscribes the obligation of an employer once a Title VII complainant produces a prima facie case and requires the employer to only articulate the non-discriminatory reasons for its action. The Respondent clearly did so herein.

As the District Court's findings of fact were based on the correct legal standard and as it applied the applicable legal standard of Title VII of the Civil Rights Act of 1964 in finding that the Petitioner was not treated "less favorably" than others because of her sex, the trial court's factual findings meet and surpass the "clearly erroneous" test and the Court of Appeals decision should be affirmed.

With respect to the Petitioner's allegations that Southwestern Bell harassed her and otherwise retaliated against her after her demotion to the job of repair clerk and her filing of a charge of discrimination under Title VII, the District Court held *inter alia* that:

> "21. Although the plaintiff has alleged further discrimination, harassment and reprisal by defendant since her demotion, no credible evidence of such discrimination, harassment and reprisal exists."

and that: